Supreme Court, U.S.
FILED
JUN 07 2000
CLERK

(3)

No. 99-1906

In the

Supreme Court of the United States

LOUIS LOWERY, WILL LIVINGSTON, MICHELLE BROOKS, and LATOSHA LINDSAY,

Petitioners,

v.

JESS BURGESS and MARILYN THOMPKINS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General of Illinois

MICHAEL P. DOYLE
Counsel of Record
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5044

Counsel for Petitioners

Printed by Authority of the State of Illinois (P.O. 27786—60—7-7-00)

11PP

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

REPLY TO BRIEF IN OPPOSITION 1

I. *Wilson v. Layne* Did Not Resolve The Conflict Among The Circuits On The Question Whether Out-Of-Circuit Decisions May Be Considered In The "Clearly Established Law" Analysis 1

II. The Petitioners Have Not Overemphasized The Conflict Among The Circuits On The Question Whether Out-Of-Circuit Decisions May Be Considered In The "Clearly Established Law" Analysis 4

CONCLUSION 7

TABLE OF AUTHORITIES

Cases	PAGE(S)
Alton v. Hopgood, 994 F. Supp. 827 (S.D. Tex. 1998), *aff'd sub nom. Alton v. Texas A & M Univ.*, 168 F.3d 196 (5th Cir. 1999)	5
Amaechi v. West, 87 F. Supp. 2d 556 (E.D. Va. 2000)	3
Brinson v. McKeeman, 992 F. Supp. 897 (W.D. Tex. 1997)	5
Hall v. Thomas, 190 F.3d 693 (5th Cir. 1999)	3, 5
Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997)	3, 6
Johnson v. Horn, 150 F.3d 276 (3d Cir. 1998)	4, 5
Murphy v. FDIC, 208 F.3d 959 (11th Cir. 2000)	6
St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)	2
Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996)	2
Sound Aircraft Serv., Inc. v. Town of E. Hampton, 192 F.3d 329 (2d Cir. 1999)	3

Thomas v. Clayton County Bd. of Educ., 94 F. Supp. 2d 1290 (N.D. Ga. 1999) 3

Truelove v. Hunt, 67 F. Supp. 2d 569 (D.S.C. 1999) 3

United States v. Lanier, 520 U.S. 259 (1997) 3

United States v. Steele, 147 F.3d 1316 (11th Cir. 1998) 6

Wilson v. Layne, 526 U.S. 603 (1999) . . . . . *passim*

Zweibon v. Mitchell, 720 F.2d 162 (D.C. Cir. 1983) 4

REPLY TO BRIEF IN OPPOSITION

I. *Wilson v. Layne* Did Not Resolve The Conflict Among The Circuits On The Question Whether Out-Of-Circuit Decisions May Be Considered In The "Clearly Established Law" Analysis.

The respondents' main argument against granting *certiorari* is that *Wilson v. Layne*, 526 U.S. 603 (1999), already informs lower courts that they may consider decisions from non-controlling jurisdictions in determining whether the law is clearly established for qualified immunity purposes. *Wilson*, however, does not stand for that proposition. Simply put, the *Wilson* Court did not have occasion to decide, and did not decide, the question raised in this case. As a result, the lower federal courts have no more guidance on the question now than they had before *Wilson*.

In *Wilson*, the Court considered whether police officers were entitled to qualified immunity when they invited members of the media to witness the execution of an arrest warrant in a private home. After determining that this practice violated the Fourth Amendment rights of the persons being arrested, the Court surveyed the decisional law on the legality of "media ride-alongs" and concluded that the law governing the defendants' conduct had not been clearly established as of the time they acted. *Wilson*, 526 U.S. at 615-18. In so ruling, the Court stated:

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable of-

> ficer could not have believed that his actions were lawful.

Wilson, 526 U.S. at 617.

Based entirely on the second clause of this sentence, the respondents contend that the Court has effectively resolved the split in authority the petitioners identified in their petition for writ of *certiorari*. (Br. in Opp. at 3-4). They are wrong. The Court did not have to decide in *Wilson* whether the relevant universe of decisional law for qualified immunity purposes should include cases from non-controlling jurisdictions. This is because the defendants in *Wilson* were entitled to qualified immunity based upon the paucity of caselaw from *any* jurisdiction on the subject of media ride-alongs. Therefore, the sentence quoted above does not constitute a holding that lower federal courts may look to non-controlling jurisdictions in determining whether the law is clearly established. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion *necessary to that result* by which we are bound") (emphasis added).

Wilson, then, did not squarely decide whether courts may rely on out-of-circuit decisions to deny public officials the benefit of qualified immunity. The Court, moreover, cannot have meant for the above-quoted sentence—which constitutes only *dicta*—to resolve a split in authority on a question that has proved so vexing to the courts of appeals. *Cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ("[W]e think it generally undesirable, where holdings of this Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code").

Therefore, there is little chance that the lower courts will read *Wilson* as providing any basis for rethinking their approaches to the qualified immunity question. *Cf. Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997) (*en banc*) (Eleventh Circuit reaffirms its decision to consider only controlling precedents in "clearly established law" analysis after *United States v. Lanier*, 520 U.S. 259 (1997), where *Lanier* did not "identify any impropriety in considering only the decisions of the circuit or highest court of the state in which the relevant events took place").

Indeed, early indications suggest that *Wilson* will not have the impact the respondents predict. Since *Wilson*, several lower courts have stated or implied that non-controlling cases need not be considered in the "clearly established law" analysis. *See, e.g., Sound Aircraft Serv., Inc. v. Town of E. Hampton*, 192 F.3d 329, 337 (2d Cir. 1999) ("To determine whether a particular right was clearly established at the time the defendants acted, the district court should consider . . . whether the decisional law of the Supreme Court and the [Second Circuit] support the existence of the right in question") (brackets in original) (internal quotations and citation omitted); *Hall v. Thomas*, 190 F.3d 693, 696-97 (5th Cir. 1999) (*per curiam*) (finding lack of clearly established law where "neither the Fifth Circuit nor the Supreme Court had spoken on the issue"); *Amaechi v. West*, 87 F. Supp. 2d 556, 562 (E.D. Va. 2000); *Thomas v. Clayton County Bd. of Educ.*, 94 F. Supp. 2d 1290, 1309 (N.D. Ga. 1999); *Truelove v. Hunt*, 67 F. Supp. 2d 569, 578 (D.S.C. 1999). None of these courts cited *Wilson* for the proposition that the relevant universe of decisional law should or even could

include cases from outside the controlling jurisdictions. These decisions belie the respondents' claim that the lower courts will refine their approaches to the "clearly established law" question in light of *Wilson*.

In sum, *Wilson* did not, and was not intended to, resolve the conflict among the courts of appeals on the question whether non-binding caselaw should be considered in determining whether the law is clearly established. Because of the acknowledged difficulty this question poses, *see, e.g., Johnson v. Horn*, 150 F.3d 276, 286 (3d Cir. 1998); *Zweibon v. Mitchell*, 720 F.2d 162, 168-69 (D.C. Cir. 1983), the lower courts should not have to glean the correct answer from *dicta*, but rather should have the benefit of this Court's considered judgment on the question. This Court should grant *certiorari* to provide guidance on this important issue.

II. The Petitioners Have Not Overemphasized The Conflict Among The Circuits On The Question Whether Out-Of-Circuit Decisions May Be Considered In The "Clearly Established Law" Analysis.

The respondents next claim that the split in authority identified at pages 8-9 of the petition for writ of *certiorari* is not as pronounced as the petitioners assert. (Br. in Opp. at 7-8). The respondents are wrong. There is a direct conflict among the circuits on the scope of relevant caselaw to be considered in the "clearly established law" analysis.

First, the respondents dispute the petitioners' contention that the Fifth Circuit will only consider its own precedents in determining whether the law is clearly established. (Br. in Opp. at 8 & n.5). If the petitioners

have misstated the Fifth Circuit's approach, then the Fifth Circuit has confused not only the petitioners, but also a distinguished judge in a sister circuit, *see Johnson*, 150 F.3d at 286 n.6 (Aldisert, J.) (Fifth Circuit will consider only controlling caselaw in qualified immunity analysis), as well as several district courts within its jurisdiction, *see Alton v. Hopgood*, 994 F. Supp. 827, 835 n.5 (S.D. Tex. 1998) ("The Fifth Circuit has directed courts to examine only Supreme Court and Fifth Circuit precedent in the course of determining whether a legal principle is 'clearly established' "), *aff'd sub nom. Alton v. Texas A & M Univ.*, 168 F.3d 196 (5th Cir. 1999); *Brinson v. McKeeman*, 992 F. Supp. 897, 907-08 (W.D. Tex. 1997) (same). In addition, the Fifth Circuit recently sustained a qualified immunity defense precisely because no controlling authority had held the conduct in question to be unlawful. *See Hall*, 190 F.3d at 696-97.

The respondents' contention that the Fifth Circuit might consider non-controlling cases in the "clearly established law" analysis is based upon one circuit judge's concurring opinion in a criminal case in which the qualified immunity defense was not even at issue. (Br. in Opp. at 8). Concurring opinions, however, are not precedential and do not signal a shift in a circuit's law. Therefore, the respondents have failed to undermine the petitioners' assertion that the Fifth Circuit will only consider controlling precedents when resolving qualified immunity questions.

As for the Eleventh Circuit, the respondents allege that the petitioners "fail to bring to this Court's attention the intramural nature of the conflict that existed within the Eleventh Circuit even prior to *Wilson v.*

Layne." (Br. in Opp. at 7). No such conflict existed before *Wilson* and none exists now.

In *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997) (*en banc*), the Eleventh Circuit reaffirmed its longstanding position that "clearly established law" can only be determined by reference to "decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." Under its "prior precedent" rule, the Eleventh Circuit will follow this *en banc* ruling until it is overruled by this Court or by the Eleventh Circuit sitting *en banc*. *See Murphy v. FDIC*, 208 F.3d 959, 969 (11th Cir. 2000); *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998). For the reasons explained above, *Wilson* has not overruled *Jenkins*. The Eleventh Circuit will thus continue to follow *Jenkins* until this Court or the Eleventh Circuit sitting *en banc* overrules it. There is no "intramural conflict" within the Eleventh Circuit.

Contrary to the respondents' argument, there is a direct conflict among the courts of appeals on whether non-controlling caselaw is relevant to the "clearly established law" analysis. (*See* Pet. for Writ of Cert. at 8-9). The answer to this question, moreover, affects local, state, and federal officials throughout the country. Because of the circuits' inability to reach a consensus on this important question, this Court should grant *certiorari* to provide a definitive answer.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General of Illinois

MICHAEL P. DOYLE
Counsel of Record
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5044

Counsel for Petitioners